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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CITIZENS FOR OPEN AND PUBLIC
PARTICIPATION,

Petitioner, Plaintiff, and Appellant,

v.

CITY OF MONTEBELLO et al.,

Respondents, Defendants, and
Respondents.

B244106

(Los Angeles County
Super. Ct. No. BC444950, BS124683)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ann I. Jones and Richard L. Fruin, Jr., Judges. Affirmed.

C. Robert Ferguson, for Petitioner, Plaintiff, and Appellant.

Alvarez-Glasman & Colvin, Roger A. Colvin, Sharon Medellin for Respondents, Defendants, and Respondents City of Montebello and Montebello City Council.

No appearance for Respondent, Defendant, and Respondent, Nick Pacheco.

INTRODUCTION

Petitioner, plaintiff, and appellant Citizens for Open and Public Participation (COPP) sought a writ of mandate and declaratory and injunctive relief against respondents, defendants, and respondents City of Montebello (City) and Montebello City Council (City Council), and sought declaratory and injunctive relief against respondent, defendant, and respondent Nick Pacheco (Pacheco). Petitioners allege that defendants failed to comply with various provisions of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.¹) (Brown Act) in connection with a November 16, 2009, special meeting of the City Council (Special Meeting) and closed session during which the City Council approved Agreement No. 2585, a “Professional Services Agreement” pursuant to which Pacheco was hired as a consultant to serve as Interim City Administrator.² Petitioners further sought a declaration that Pacheco’s agreement with the City violated section 1090, and thus was void *ab initio* and should be deemed rescinded because Pacheco made or drafted the agreement while acting as the City’s Interim Assistant City Administrator and had a financial interest in the agreement. The trial court first found certain violations of the Brown Act but denied COPP writ relief, and then, in a separate proceeding, denied COPP declaratory and injunctive relief and COPP’s request for attorney fees.³ COPP

¹ All statutory citations are to the Government Code unless otherwise noted.

² COPP’s initial and first amended petitions for writs of mandate and complaints for declaratory and injunctive relief identified Pacheco, former City Administrator Richard Torres, and current and then former Interim Finance Director Michael Tam as real parties in interest. The trial court dismissed Torres and Tam in connection with its ruling on the petition for writ of mandate in the first amended petition and complaint. COPP named Pacheco as a defendant in the second and third amended petitions and complaints.

³ After the trial court’s ruling on the writ petition, the trial court consolidated this case with Case No. BC444950, an action by Pacheco seeking contract damages based on the City’s termination of Pacheco’s agreement with the City before the end of the agreement’s term. The trial court granted summary judgment to the City and dismissed Pacheco’s action. There are no issues raised in this appeal regarding the grant of summary judgment in Case No. BC444950.

appeals from the denial of declaratory and injunctive relief and the denial of its request for attorney fees. We affirm.

BACKGROUND⁴

A. The November 16, 2009, Special Meeting and Closed Session

Regular meetings of the City Council were calendared for November 11 and 25, 2009. A regular meeting was not calendared for November 16, 2009. On November 13, 2009, the City posted a “Call and Notice of a Special Meeting” of the City Council to be held on November 16, 2009. The Call and Notice stated that the Special Meeting was being called “for the purpose of the following:

“CLOSED SESSION

“a. PUBLIC EMPLOYEE RELEASE/ACCEPTANCE OF RETIREMENT OF
THE CITY ADMINISTRATOR—

Government Code section 54957

“b. PUBLIC EMPLOYMENT AND EMPLOYEE APPOINTMENT—

Government Code section 54957

Titles: City Administrator, Interim City Administrator, Assistant
City Administrator, Interim Assistant City Administrator,
City Finance Director, Interim City Finance Director

“The City Council to consider terms of employment, possible contract
amendments, appointment, evaluation of performance, discipline, and/or
separation of the above listed public employees.”

The Call and Notice for the Special Meeting did not provide an opportunity for the public to participate. Prior to the Special Meeting, a “Special Meeting Agenda” was distributed to the public. The agenda items were: (1) “Call Meeting to Order,” (2)

⁴ The facts appear not to be in dispute; we base this fact statement on the evidence presented in the trial court, the Honorable Ann I. Jones’s February 8, 2011, written “Ruling on Petition For Writ Of Mandate On The First Cause Of Action Heard On February 8, 2011,” and the Honorable Richard L. Fruin, Jr.’s July 17, 2012, “Statement of Decision.”

“Roll Call,” (3) “Statement of Oral Communications,” which provided the public the opportunity to address the City Council on the items identified in the notice for the Special Meeting,⁵ and (5)(a) and (b) the closed session items quoted above from the Call and Notice for the Special Meeting. (There was no agenda item “4.”)

With respect to the closed session, the minutes for the Special Meeting stated: “A majority of the council gave direction to staff to extend the contract of the Interim Finance Director, until June 30, 2010, or as long as PERS requirements allow. Items under City Administrator, Assistant City Administrator, Interim Assistant City Administrator, City Finance Director and Interim City Finance Director were discussed, direction was given to staff, no final action. City Administrator Torres announced that approval was given to enter into a contract with Nick Pacheco as Interim City Administrator until June, 30, 2010, at monthly rate of \$15,000.00 with no benefits or severance packages, at [sic] directed by the City Council.” The minutes did not reflect the votes or abstentions of the individual City Council members in the closed session on Pacheco’s hiring and increase in compensation, or that the City Council took any final action thereafter in open session with respect to Pacheco’s hiring or compensation.

On November 20, 2009, Pacheco and the City executed Agreement No. 2585 concerning Pacheco’s employment as Interim City Administrator. According to the minutes for the November 25, 2009, regular session of the City Council, three new members of the City Council were sworn in on November 24, 2009, apparently as the result of a municipal election held on November 3, 2009. On December 9, 2009, at a regular session of the City Council, the new City Council determined that Pacheco’s

⁵ The Statement of Oral Communications stated, “Individuals interested in addressing the City Council during this special meeting may only address the City Council on items which have been described in the notice for this special meeting in accordance with Government Code Section 54954.3(a). If you wish to speak on such item, please complete a form, provided at the door, and turn it in to the City Clerk by no later than 4:00 p.m. so that you will have an opportunity to speak before or during consideration of that item. [¶] The maximum amount of time allotted for individual Public and Council comments shall not exceed THREE (3) minutes.”

agreement with the City was “void and of no effect,” and terminated Pacheco’s services with the City as Interim City Administrator effective December 10, 2009.

On December 14, 2009, COPP filed a demand letter with the City pursuant to the cure and correction provisions in section 54960.1 concerning various alleged violations of the Brown Act. The City did not respond to the demand letter within the time provided by section 54960.1.

B. The Trial Court’s Ruling on COPP’s First Cause of Action for Writ of Mandate

On October 14, 2010, COPP filed a first amended petition for writ of mandate and complaint for declaratory and injunctive relief. In the first cause of action, by which COPP sought a writ of mandate, COPP alleged that the City Council acted in violation of the Brown Act in connection with the November 16, 2009, Special Meeting and closed session by failing to provide to the public adequate notice of the meeting and closed session or an adequate, lawful agenda for the meeting. The failure to provide a proper agenda for the meeting allegedly was a bad faith effort to “discourage or prevent public participation prior [to the] closed session, and to prevent opposition to the City’s employment of RPI Pacheco as the Interim City Administrator.” As a result of the Brown Act violations, COPP alleged in its first cause of action that all decisions and actions taken at the Special Meeting were null and void.

In paragraph 32 of the first cause of action, COPP alleged that the Call and Notice for the Special Meeting, the Special Meeting, and the closed session violated the Brown Act as follows:

“a. The Call and Notice for the November 16, 2009 Special Meeting did not notify the public of its opportunity for member [*sic*] of the public to address the Montebello City Council.

“b. Members of the public could not lawfully speak at the November 16, 2009 Special Meeting because the opportunity was not set forth in the Call and Notice that was posted 24 hours before the November 16, 2009 Special Meeting.

“c. No open meeting was scheduled for the November 16, 2009 Special Meeting and by reason thereof the Montebello City Council did not acquire the power or authority to hold a closed session.

“d. The contract between the City of Montebello and RPI Pacheco was not provided to those persons requesting it at the end of the closed session and it was not made available promptly.

“e. The Call and Notice for the Special Meeting of November 16, 2009 provided only for the consideration of various staff positions and not for the appointment or employment of a public employee.

“f. At the November 16, 2009 closed session, the City Council discussed and took action on the employment of at least one public employee.

“g. The Notice of the Special Meeting was not provide [*sic*] to the newspapers of general circulation that had specifically requested it 24 hours prior to the November 16, 2009 Special Meeting.

“h. The City Council failed to disclose that the employment of RPI Pacheco as Interim City Administrator would be the subject of the closed session.

“i. After the November 16, 2009 closed session, the City Council failed to report the vote or abstention of every member present, including the vote or abstention of Councilmember Robert Urteaga.

“j. (i) After the November 16, 2009 closed session, the City Council failed to hold an open session to take final action on the increase in compensation for RPI Nick Pacheco from \$12,500.00 per month to \$15,000.00 per month, or his compensation, in violation of Government Code § 54957.6(a).

“(ii) The purpose of discussing and determining RPI Nick Pacheco’s salary was not agendised [*sic*] in violation of Government Code § 54956.”

In the first amended petition and complaint, COPP, in the prayer for relief, sought a writ of mandate compelling the City to “provide proper and timely notice of a regular or special meeting prior to Respondents’ vote on the adoption and/or approval of its contract

with Real party in Interest Nick Pacheco.”⁶ On February 8, 2011, Judge Jones heard and decided the petition for writ of mandate on the first cause of action.

In her ruling on COPP’s petition for writ of mandate, Judge Jones found substantial compliance with the Brown Act. Judge Jones noted that the City and City Council conceded that the Call and Notice for the Special Meeting did not expressly include a “Public Comment” section, a violation of section 54954.3, subdivision (a),⁷ but ruled that the deficiency was cured by the Special Meeting Agenda, which included the Statement of Oral Communications that informed the public of its right to address the City Council concerning the items in the Call and Notice. Judge Jones also rejected COPP’s claim that the City and City Council violated section 54957.1, subdivision (c),⁸ by failing to provide the agreement between Pacheco and the City to persons who requested it at the end of the closed session. Judge Jones found that the agreement was not entered into until November 20, 2009, four days after the Special Meeting. To the extent that COPP still sought the production of the agreement, Judge Jones observed, the agreement had been provided to COPP in January 2010.

Judge Jones ruled, however, that the City Council had violated the Brown Act by failing to report the old City Council members’ votes or abstentions regarding Pacheco’s

⁶ Elsewhere in the first amended petition and complaint, it appears that COPP stated that it was seeking a writ of mandate that nullified the actions taken by the City and City Council at the Special Meeting and required future calls and notices and meeting agendas to comply with the Brown Act.

⁷ Section 54954.3, subdivision (a) provides in relevant part: “Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.”

⁸ Section 54957.1, subdivision (c) provides: “The documentation referred to in subdivision (b) [contracts, etc.] shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.”

agreement with the City (§ 54957.1⁹) and by making a final decision on Pacheco's compensation in closed rather than open session (§ 54957.6, subd. (a)¹⁰). Judge Jones stated that COPP sought a writ of mandate declaring null and void the agreement between Pacheco and the City. Judge Jones found, however, that there was no available remedy for the failure to report the old City Council's votes because section 54960.1¹¹ did not

⁹ Section 54957.1, subdivision (a)(5) provides in relevant part: "The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention on that action of every member present, as follows:

"[¶]—[¶]

"(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position."

As Pacheco was employed pursuant to a consulting agreement, he may not have been a "public employee" within the meaning of section 54957.1, subdivision (a)(5). None of the parties raised an issue in this appeal with respect to Pacheco's status as a "public employee."

¹⁰ Section 54957.6, subdivision (a) provides in relevant part: "Notwithstanding any other provision of law, a legislative body of a local agency may hold closed sessions with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.

"[¶]—[¶]

"Closed sessions held pursuant to this section shall not include final action on the proposed compensation of one or more unrepresented employees."

As Pacheco was employed pursuant to a consulting agreement, he may not have been an "employee" within the meaning of section 54957.6, subdivision (a). None of the parties raised an issue in this appeal with respect to Pacheco's "employee" status.

¹¹ Section 54960.1, subdivision (a) provides in relevant part: "The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section."

list a violation of section 54957.1¹² among the violations for which a writ of mandate could be used to declare an act null and void; the new City Council had, in any event, declared void the agreement between Pacheco and the City; requiring the new City Council to report the votes of the old City Council served no purpose; there was no practicable way to reconstruct the votes accurately; and the failure to report the votes of City Council members appeared to have been a one-time occurrence, so there was no need to direct future conduct by the City Council. Judge Jones also determined that there was no remedy available for the failure to make the final decision on Pacheco's compensation in open session because section 54960.1 did not list a violation of section 54957.5, subdivision (a) among the violations for which a writ of mandate could be used to declare an act null and void; the new City Council had declared void the Pacheco agreement; mandating the new City Council to hold an open session to report on increased compensation for Pacheco was unnecessary; and there was no evidence of a similar Brown Act violation on any other occasion, so there was no need to direct future conduct by the City Council.

At the hearing on COPP's petition for writ of mandate, Judge Jones emphasized in her ruling that there was no remedy for the Brown Act violations when she stated, "this is one of those cases where the petitioners prevailed in certain parts for violations, but there's nothing further to be done, the actions have been fully repudiated by the existing City Council. So any actions taken you're asking me to declare null and void, but they were void, I believe, in December, so it's one of those writs without a remedy. [¶]-[¶] I can't further mandate something that's already happened. [¶]-[¶] [T]he remedy you seek has already been afforded you by the body you seek to have me order do it."

Judge Jones limited her ruling to the requested writ relief. Judge Jones transferred the matter to Department One for reassignment to an individual calendar court for a "full adjudication of the second and third causes of action" for declaratory and injunctive relief. (The matter was reassigned to Judge Fruin for adjudication of the

¹² The trial court misidentified as section 54952.6 the section that the old City Council violated.

second and third causes of action.) Judge Jones then entered “judgment” on the writ petition. Thereafter, Judge Jones denied COPP’s motion for attorney fees, finding that such an award would be “unjust” because the petition was “wholly unnecessary.” Judge Jones reasoned that the new City Council had repudiated the old City Council’s actions by declaring null and void Pacheco’s agreement with the City. Thus, COPP’s petition sought to “‘undo’ something that had already been undone,” which circumstance COPP knew before filing its writ petition.

C. The Trial Court’s Ruling on COPP’s Second and Third Causes of Action for Declaratory and Injunctive Relief Based on Alleged Brown Act Violations

COPP, in the second cause of action, for declaratory relief, in the third amended petition and complaint¹³ alleged that the City and Pacheco “deliberately failed and refused to properly agendize [*sic*] the November 16, 2009 Special Meeting in that:

“a. The Call and Notice for the November 16, 2009 Special Meeting did not notify the public of its opportunity for members of the public to directly address the Montebello City Council.

“b. Members of the public could not lawfully speak at the November 16, 2009 Special Meeting because the opportunity was not set forth in the Call and Notice that was posted 24 hours before the November 16, 2009 Special Meeting.

¹³ Judge Fruin’s Statement of Decision refers to the Second Amended Petition for Writ of Mandate, Complaint for Declaratory and Injunctive Relief as the operative pleading. Instead, as Judge Fruin acknowledged at trial, the third amended petition and complaint was the operative pleading. The Brown Act allegations in paragraph 32 in the first amended petition and complaint, described above, and in the third amended petition and complaint were largely the same. The third amended petition and complaint omitted the allegation that Pacheco’s compensation was not on the agenda for the November 16, 2009, Special Meeting, and added the allegation that Pacheco was present during the City Council’s closed session on November 16, 2009, when his employment agreement was approved.

“c. No open meeting was scheduled for the November 16, 2009 Special Meeting and by reason thereof the Montebello City Council did not acquire the power or authority to hold a closed session.”

The second cause of action further alleged that the City and Pacheco:

“a. Failed and refused to provide the requested documents to Petitioner or the public or to affected person [*sic*] or entities as required by law.

“b. After the November 16, 2009 closed session, failed, of [*sic*] caused the failure to report the vote or abstention of every member present.

“c. Failed to place the approval of Defendant Pacheco’s compensation on either the Call and Notice or the purported Agenda for the November 16, 2009 City Council meeting.

“d. After the November 16, 2009 closed session, the City Council and Defendant Pacheco failed, of [*sic*] caused the failure to hold an open session to take final action on the Compensation of RPI Tam or the increase in compensation for Mr. Nick Pacheco from \$12,500.000 per month to \$15,000.00 per month.”

In the second cause of action, for declaratory relief, COPP alleged that a controversy existed between the City and COPP concerning the alleged failure and refusal to properly “agendize” the Special Meeting; to provide necessary documents to COPP, the public, or to affected persons or entities; to disclose the vote taken in closed session; or to vote on salaries in open session. According to the allegations in the second cause of action, defendants denied COPP’s contention that defendants’ violation of the Brown Act deprived COPP, the public, and affected persons or entities who were not present at the November 16, 2009, Special Meeting of “the opportunity or need to raise critical issues.” In its prayer for relief in the third amended petition and complaint, COPP sought a declaration that the City and City Council violated the Brown Act as alleged in the second cause of action.

In its third cause of action, for injunctive relief, COPP alleged that the City had violated the Brown Act and had indicated that it would continue to violate the Brown Act in the following ways:

“a. Call and Notices for the Special Meetings do not notify the public of its opportunity for members of the public to directly address the Montebello City Council.

“b. Members of the public cannot lawfully speak at the Special Meetings because the opportunity was not set forth in the Call and Notice.

“c. Open meetings are scheduled for the Special Meetings and by reason thereof the Montebello City Council does not acquire the power or authority to hold a closed session.

“d. The City will fail and refuse to provide requested documents to Petitioner or the public or to affected person [*sic*] or entities as required by law, including but not limited to the Brown Act.

“e. After the closed sessions the City Council fails to report the vote or abstention of every member present.

“f. The City Council failed to place the approval of Defendant Pacheco’s compensation on either the Call and Notice or the purported agenda for the November 16, 2009 City Council meeting.

“g. After the closed sessions the City Council fails to hold open sessions to take final action on employee compensation.”

In its prayer for relief in the third amended petition and complaint, COPP sought a permanent injunction prohibiting the City and City Council from further commission of the Brown Act violations alleged in the third cause of action.

In a bench trial on COPP’s causes of action for declaratory and injunctive relief, Judge Fruin ruled that he would not hear evidence concerning whether there had been Brown Act violations because Judge Jones had heard the evidence and ruled on the Brown Act violations.¹⁴ Thus, he reasoned, he was bound by Judge Jones’s rulings based on the doctrine of *res judicata*. Judge Fruin limited the trial on the second and third

¹⁴ Nevertheless, it appears that Judge Fruin found that the City violated the Brown Act by failing to notify newspapers of general circulation about the Special Meeting.

causes to the issues of whether COPP was entitled to declaratory or injunctive relief based on Judge Jones's rulings.¹⁵

As to Judge Jones's rulings that the City Council had violated the Brown Act by failing to report the old City Council members' votes or abstentions regarding Pacheco's agreement with the City and by making a final decision on Pacheco's compensation in closed rather than open session, Judge Fruin denied declaratory and injunctive relief. Judge Fruin denied declaratory relief based on his finding that there was no actual, present controversy about whether the City Council would comply with the Brown Act in the future, and specifically with the Brown Act provisions that required in open session the disclosure of votes taken in closed session. COPP had failed, Judge Fruin found, to present any evidence that the City Council was likely to violate the Brown Act in the future.

Judge Fruin denied injunctive relief based on his finding that COPP had not presented any evidence that an injunction was required to ensure the City's future compliance with the Brown Act. The actions taken in violation of the Brown Act were, Judge Fruin found, the "last gasp of an outgoing City Council majority," all of whom had been defeated or recalled but had yet to surrender their offices." Judge Fruin found that the new City Council had remedied the action taken by the old City Council as soon as the new City Council was seated, and that the new City Council repudiated the contract the old City Council had approved by procedures that violated the Brown Act.

D. The Trial Court's Ruling on COPP's Request for Attorney Fees

Judge Fruin denied COPP's request for attorney fees. Judge Fruin largely adopted Judge Jones's reasons for denying COPP's earlier request for fees—i.e., COPP's action had accomplished very little, the new City Council had repudiated the actions of the old

¹⁵ Because the fourth cause of action for declaratory relief concerning the validity of Pacheco's agreement with the City under section 1090 was not before Judge Jones, Judge Fruin did not limit evidence presented on that cause of action. We omit, however, a recitation of the evidence relevant to that claim because, as we set forth below, COPP abandoned at oral argument on appeal its contention with respect to section 1090.

City Council demonstrating its commitment to Brown Act compliance, it was unlikely that the old City Council's unlawful acts would recur, and COPP filed its action after the new City Council reversed the wrongful action of the old City Council by rescinding Pacheco's agreement with the City.

DISCUSSION

I. Relevant Legal Principles

“The Brown Act requires open public meetings and gives people the right to attend meetings of local legislative bodies, subject to statutory exceptions. [Citation.] The Brown Act establishes the general rule that ‘meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.’ (§ 54953, subd. (a).) The Brown Act has the objective of facilitating public participation in local government decisions and curbing misuse of the democratic process by secret legislation. [Citation.]” (*Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, 95; *Service Employees Internat. Union, Local 99 v. Options—A Child Care & Human Services Agency* (2011) 200 Cal.App.4th 869, 877 [“the purpose of the Brown Act is to ensure openness in decisionmaking by public agencies and facilitate public participation in the decisionmaking process”].)

Section 54960 is the primary enforcement section of the Brown Act. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 914.) Section 54960, subdivision (a) provides in relevant part: “The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body, subject to Section 54960.2”

II. Declaratory and Injunctive Relief

COPP argues that Judge Fruin erred in denying declaratory and injunctive relief. COPP appears also to argue that Judge Fruin erred in failing to re-adjudicate the alleged Brown Act violations when he ruled on COPP's causes of action for declaratory and injunctive relief. Judge Fruin properly relied on Judge Jones's Brown Act rulings, and properly denied declaratory and injunctive relief.

A. *Re-Adjudication of the Brown Act Allegations*

Judge Jones limited her rulings on COPP's writ petition to the issues of whether COPP had established Brown Act violations and whether it was entitled to writ relief. Judge Jones did not consider whether, by virtue of the Brown Act violations, COPP was entitled to declaratory and injunctive relief. Having found Brown Act violations, Judge Jones transferred the matter to Department One for reassignment to an individual calendar court for a "full adjudication of the second and third causes of action" for declaratory and injunctive relief.

As set forth above, when the matter was reassigned to him, Judge Fruin declined to hear evidence on the issue of whether there were Brown Act violations, reasoning that he was bound by Judge Jones's prior rulings on the Brown Act violations by the doctrine of res judicata. Thus, Judge Fruin limited the trial on the second and third causes to the issue of whether COPP was entitled to declaratory or injunctive relief based on the Brown Act violations that Judge Jones had found.

COPP interprets Judge Jones's order transferring its action for a "full adjudication" of its causes of action for declaratory and injunctive relief as including a full re-adjudication of its Brown Act allegations as they supported his claims for declaratory and injunctive relief. Judge Fruin properly rejected that interpretation. Judge Fruin was bound by Judge Jones's rulings on the Brown Act allegations. (*Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876-877 ["one trial court judge may not reconsider and overrule a ruling of another judge"]; *Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736, 738-740 [a second judge erred in dismissing an action for failure to timely

make service of process when a first judge previously permitted service by publication based on its finding of fact that the defendant was concealing himself to avoid service of process]; *Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588.) Accordingly, the bench trial before Judge Fruin properly was limited to the propriety of declaratory or injunctive relief based on Judge Jones's rulings that the City Council had violated the Brown Act by failing to report the old City Council members' votes or abstentions regarding Pacheco's agreement with the City and by making a final decision on Pacheco's compensation in closed rather than open session. COPP does not on appeal challenge the rulings of Judge Jones.

B. Declaratory Relief

“““The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.”” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [124 Cal.Rptr.2d 519, 52 P.3d 695].)” (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1054.) As set forth above, Judge Fruin denied COPP's request for declaratory relief based on his finding that there was no actual, present controversy about whether the City Council would comply with the Brown Act in the future. COPP contends that the City and City Council have never admitted their Brown Act violations. But, upon entering office, the new City Council declared void Pacheco's agreement with the City and terminated his employment, thus, in effect, repudiating the Brown Act violations of the old City Council and in no way indicating it would not comply with the Brown Act in the future. Accordingly, because there was not an actual, present controversy over Brown Act compliance, Judge Fruin did not err in denying COPP declaratory relief. (*Ibid.*)

C. Injunctive Relief

We review the denial of injunctive relief for an abuse of discretion. (*East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1125.) “An injunction properly issues only where the right to be protected is clear,

injury is impending and so immediately likely as only to be avoided by issuance of the injunction. [Citation.] A corollary of this rule is that a change in circumstances which renders injunctive relief unnecessary justifies denial of the remedy. [Citation.] An injunction should not issue as a remedy for past acts which are not likely to recur. [Citation.]” (*Id.* at p. 1126.)

As with Judge Fruin’s denial of declaratory relief, COPP contends that Judge Fruin erred in denying injunctive relief because the evidence demonstrated that the City and City Council never admitted their Brown Act violations. Judge Fruin found that COPP had not presented any evidence that showed an injunction was needed to ensure future Brown Act compliance by the City Council. Judge Fruin found that the members of the old City Council who had violated the Brown act had been turned out of office and the new City Council remedied the Brown Act violations as soon as it was seated. Such action by the new City Council indicated its intention to comply with the Brown Act in the future.

The absence of evidence of likely future Brown Act violations of the type Judge Jones found was demonstrated by the candor of COPP’s counsel at the trial of COPP’s cause of action for injunctive relief. Judge Fruin asked COPP’s counsel if COPP had evidence that future Brown Act violations were likely. Counsel responded, “No, we don’t, Your Honor, not of the type that would normally come in terms of an injunction. It may come to pass during the testimony that that becomes evident, but the conduct that was rampant on the 16th of November to my knowledge has not been continued. They’ve corrected those.” In light of counsel’s response, Judge Fruin asked counsel to state the basis upon which injunctive relief could be granted. Counsel responded that “something may happen” and speculated that evidence might “come to pass during the trial that would indicate that there is a probability or a possibility that it may come to fruition again.” Counsel stated that COPP did not want the Brown Act violations that took place on November 16, 2009, repeated. On appeal, COPP does not identify any evidence subsequently adduced at the trial that showed likely future Brown Act violations of the type that Judge Jones found. Because there was no evidence that the past Brown

Act violations were likely to recur, the trial court did not abuse its discretion in denying injunctive relief. (*East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection, supra*, 43 Cal.App.4th at pp. 1125-1126.)

III. Section 1090¹⁶

In its opening and reply briefs, COPP contended that the trial court erred in failing to declare that Pacheco's agreement with the City violated section 1090,¹⁷ and thus was void from its inception because Pacheco made or drafted the agreement while he was the City's Interim Assistant City Administrator and had a financial interest in the agreement. At oral argument on appeal, COPP abandoned its section 1090 contention, stating that the issue was "moot" and that it was not going to "push it."

IV. Attorney Fees

COPP contends that Judge Fruin erred in declining to award it attorney fees, apparently on the assertion that its action will prevent future Montebello city councils from making the same Brown Act violations made by the old City Council. Judge Fruin acted within his discretion in denying COPP its attorney fees.

Section 54960.5¹⁸ authorizes an award of attorney fees, in the trial court's discretion, to a successful Brown Act plaintiff. In considering whether to award attorney fees under section 54960.5, a "trial court 'should consider among other matters "the

¹⁶ Pacheco did not file a respondent's brief on appeal.

¹⁷ Section 1090 provides in relevant part: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

¹⁸ Section 54960.5 provides in relevant part: "A court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960, 54960.1, or 54960.2 where it is found that a legislative body of the local agency has violated this chapter."

necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit.” [Citations.]’ (*Bell v. Vista Unified School Dist.* [(2000)] 82 Cal.App.4th [672,] 686.)” (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1083.)

Trial courts are not “obliged to award fees in every Brown Act case and must ‘thoughtfully exercise’ their discretion by examining all the circumstances to determine whether an award of fees would be unjust.” (*Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1324.) “[T]he trial court has the discretion to deny successful Brown Act plaintiffs their attorneys fees, but only if the defendant shows that special circumstances exist that would make such an award unjust.’ (*Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors*, *supra*, 112 Cal.App.4th at p. 1327.)” (*Galbiso v. Orosi Public Utility Dist.*, *supra*, 167 Cal.App.4th at p. 1083.)

Judge Fruin denied COPP’s request for attorney fees because COPP’s action “‘accomplished very, very little—if anything’”; the City Council’s unilateral decision to repudiate Pacheco’s agreement with the City demonstrated the City Council’s commitment to the Brown Act’s policies of transparency and accountability, and demonstrated that it was unlikely that the old City Council’s unlawful acts would recur; COPP was unsuccessful in obtaining any remedy for the Brown Act violations; COPP filed its action after the new City Council reversed the wrongful action of the old City Council by rescinding Pacheco’s agreement with the City; and there was no evidence that the Brown Act violations represented a pattern of such violations. There is a basis supporting Judge Fruin’s discretion, as outlined in Judge Fruin’s Statement of Decision, in which he finds that special circumstances existed that made any award of attorney fees to COPP unjust. (*Galbiso v. Orosi Public Utility Dist.*, *supra*, 167 Cal.App.4th at p. 1083; *Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors*, *supra*, 112 Cal.App.4th at p. 1327.) That COPP filed its action even though it knew that the new City Council had taken swift and decisive action to repudiate the conduct of the

old City Council—i.e., before COPP had even sent its cure and correct demand letter to the City—also, and particularly, supports Judge Fruin’s ruling.

COPP argues that attorney fees are appropriate because its action sought to prevent a “multiplicity of suits. In other words, in terms of this case to make sure that Respondent City Council, which in the future *may very well include members of the Old City Council*, do not repeat the same violations.” (Italics added.) The suggestion in support of such an argument that there is a significant chance that the public would return to office the members of the old City Council, which members the public had either recalled or voted out of office, and that the old City Council would again violate the Brown Act so that it could benefit an apparent ally, is too speculative.

DISPOSITION

The judgment is affirmed. The City and City Council are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.